

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)

Billed Party Preference)
for 0+ InterLATA Calls)

CC Docket No. 92-77

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

REPLY COMMENTS OF GATEWAY TECHNOLOGIES, INC.
ON FURTHER NOTICE OF PROPOSED RULEMAKING

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SUMMARY

The opening comments on the Commission's Further Notice leave absolutely no doubt, as Gateway Technologies has argued, that billed party preference for interLATA operator services should not be extended to inmate services. Application of BPP to the highly specialized correctional institution market is unjustified because the market is clearly functioning efficiently, to the mutual benefit of American prisons and jails, taxpayers and inmates. There is no record evidence of widespread rate or other abuses in inmate services warranting Commission intervention.

Virtually all the parties commenting on inmate services—including the Federal Bureau of Prisons, the American Jail Association, numerous correctional facilities and sheriffs and most of the Regional Bell Companies—strongly opposed the extension of BPP to correctional institutions. No party has come forward with any evidence that the network modifications proposed in the Further Notice as solutions to the security and fraud control requirements of correctional facilities are technically feasible or economically justifiable. To the contrary, as Ameritech, Bell Atlantic and other major LECs have commented, there is no network solution available to meet the legitimate needs of prisons and jails, making it “foolish to extend billed party preference to inmate services.”

More broadly, no party, including the inmate advocacy organizations, has provided the Commission with any objective information indicating that there is a serious competitive void in the correctional institution market. No party has shown that under a BPP scheme, any incremental effect on inmate collect calling rates could outweigh the substantial costs of purchasing the specialized, sophisticated prison and jail CPE now generally available at no cost to correctional institutions. Gateway has estimated these costs to be as much as \$317 million, in the first year alone, substantially eclipsing any marginal rate benefit available under BPP. Furthermore, virtually no complaints about inmate service rates have been filed with the Commission, undermining any suggestion

that there is a real problem of rate abuse in correctional institutions. As Gateway demonstrated with a review of tariffed inmate service provider rates in its opening comments, most major firms in the market offer services at rates that are fully competitive with, and in some cases lower than, the collect calling rates of the largest OSPs.

There is simply no support for the rate-related concerns presented in favor of extending BPP to correctional institutions. Moreover, the social welfare and tax policy arguments offered by the inmate advocacy groups are meritless, shortsighted and possibly unconstitutional. The Commission should defer to the administrative decisions of federal and state correctional institutions on inmate telephone privileges. Certainly, the Commission has no authority to transfer revenue responsibility for communications costs or inmate welfare/rehabilitation programs to the general body of taxpayers.

Finally, as NARUC observes, there is no technical or legal basis to preempt state regulation by applying BPP to intrastate "0+" calls. Indeed, because the inmate services market is functioning efficiently, the Commission should opt for a rate "cap," benchmark or other form of direct regulation only as a last resort, if carrier-specific rate enforcement proceedings prove ineffective. Gateway does not oppose a properly structured rate benchmark—because its rates are both competitive with the major OSPs and among the lowest in the inmate services market—but a rate measure is acceptable, if at all, only as part of a package of BPP implementation adjustments.

TABLE OF CONTENTS

	<u>Page</u>
SUMMARY	i
INTRODUCTION	1
DISCUSSION	4
I. The Overwhelming Majority of Commenters Oppose Extension of BPP to Correctional Institution Inmate Services	4
II. The Comments Completely Contradict the Further Notice's Assumption that Network Technological Developments Can Satisfy the Fraud and Security Requirements of Correctional Institutions	7
III. There is No Record or Empirical Support for the Rate-Related Concerns Voiced By CURE and Other Advocates of Extending BPP to Inmate Services	10
IV. The Social Welfare and Tax Policy Arguments Offered by the Inmate Advocacy Groups are Meritless, Shortsighted and Possibly Unconstitutional	13
V. There is No Legal or Technical Basis to Preempt State Regulation by Applying BPP to Intrastate and IntraLATA Traffic	18
VI. An Inmate Services Rate Cap is Acceptable, If At All, Only as Part of a Package of Implementation Measures	20
CONCLUSION	23

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The opening comments on the Commission's Further Notice of Proposed Rulemaking ("FNPRM" or "Further Notice")¹ leave absolutely no doubt, as Gateway Technologies, Inc. ("Gateway") has argued,² that billed party preference ("BPP") for inter-LATA operator services should not be extended to inmate services. Application of BPP to the highly specialized correctional institution market is unjustified because the market is clearly functioning efficiently, to the mutual benefit of American prisons and jails, taxpayers and inmates. There is no record evidence of widespread rate or other abuses in inmate services warranting Commission intervention.

INTRODUCTION

Application of BPP to correctional institutions obviously requires, as an initial predicate, that the Commission first conclude that interstate operator services in general should be subject to BPP. Although the Commission's Further Notice indicated a tentative view that the benefits of BPP would outweigh its substantial costs, many com-

¹ Billed Party Preference for 0+ InterLATA Calls, Further Notice of Proposed Rulemaking, CC Docket No. 92-77, FCC 94-117, ¶¶ 42-46, 51 (released June 6, 1994) ("FNPRM" or "Further Notice"). By Order released August 17, 1994 (DA 94-901), the Acting Chief, Common Carrier Bureau extended the deadline for filing of reply comments until September 14, 1994.

² See Comments of Gateway Technologies, Inc. on Further Notice of Proposed Rulemaking (filed Aug. 1, 1994) ("Gateway Comments"). Unless otherwise noted, all opening comments filed in this docket will be cited by reference to the name of the commenting party and applicable page numbers, e.g., "Gateway Comments at ___-___."

ments—among others those of AT&T, BellSouth, Bell Atlantic and NYNEX—have opposed BPP, directly challenging the Commission's underlying cost/benefit assumptions with empirical data.³ Others, like NARUC, urge the Commission to more carefully examine the policy and technical justifications for a BPP policy before proceeding.⁴

The Commission's Further Notice also asked for comment on whether billed party preference, if adopted, should be extended beyond aggregator locations (payphones, hotels, etc.) to inmate services. FNPRM ¶ 51. The Commission sought specific comment on several technical issues associated with fraud control in the prison and jail environment, suggesting (based on ex parte filings by MCI, Citizens United for the Rehabilitation of Errants ("CURE") and others) that technical network developments could easily meet the fraud and security interests of correctional institutions. *Id.* ¶¶ 45-46, 51 & nn. 70-73

The answer to the Commission's inquiry is clearly that there is no substitute for the CPE-based services provided by Gateway and other specialized carriers to the nation's federal and state correctional institutions. Virtually all the parties commenting on inmate services, including the Federal Bureau of Prisons, opposed the extension of BPP to correctional institutions. No party has come forward with any evidence that the Line Information Data Base ("LIDB") modifications suggested in the FNPRM are technically feasible or economically justifiable. To the contrary, as Ameritech, Bell Atlantic and other major LECs have commented, there is no technical network solution available to meet the security and fraud protections required by prisons and jails, making it "foolish to extend billed party preference to inmate services."⁵ Indeed, all of the serious analyses of the inmate services issue recognize, as Gateway emphasized, that CPE-based call controls are essential for meeting the legitimate needs of correctional institutions.

³ AT&T Comments at 3-18; BellSouth Comments at 2-16; Bell Atlantic Comments at 1-16; NYNEX Comments at 3-14.

⁴ NARUC Comments at 4.

⁵ Bell Atlantic Comments at 17.

Pacific Bell, for instance, suggests that BPP could be applied to correctional institutions only if premises-based call controls are first "required" for all prisons and jails.⁶

More broadly, no party, including CURE, has provided the Commission with any objective information indicating that there is a serious competitive void in the correctional institution market. No party has contradicted Gateway's showing that, under a BPP scheme, the costs of specialized, sophisticated prison and jail CPE would vastly outweigh any incremental effect on inmate collect calling rates. These costs may be as much as \$317 million in the first year alone, clearly outweighing any marginal rate benefit available under BPP.⁷ Furthermore, having chosen not to file a single Communications Act complaint with the Commission involving inmate services, it is simply not credible for CURE and other inmate advocates to maintain, without supplying proof, that there is a severe problem of rate abuse in inmate services. As demonstrated by their tariffs, most major firms in the market offer services at rates that are fully competitive with, and in some cases lower than, the collect calling rates of the largest OSPs.

The social welfare and tax policy arguments offered in favor of extending BPP to prisons and jails are meritless, shortsighted and possibly unconstitutional. The Commission should (and is probably required to) defer to the administrative decisions of state and federal correctional officials on structuring inmate communications privileges. Moreover, BPP would harm the mutual interests of correctional facilities, inmates and taxpayers by diminishing the availability of telephone services to inmates and transferring massive revenue requirements to the general body of taxpayers. If the Commission wants to serve the interests of inmates, it should instead selectively enforce the Act's requirement for reasonable rates against specific inmate service providers that may be charging excessive prices, adopting regulation—or a rate "cap"—only as a last resort.

⁶ Pacific Bell Comments at 3.

⁷ Gateway Comments at 14 & Atch. A.

In short, the inmate services market is functioning well, and there is no legal or policy basis to change it by imposing billed party preference on correctional institutions.

DISCUSSION

I. The Overwhelming Majority of Commenters Oppose Extension of BPP to Correctional Institution Inmate Services

Gateway's opening comments demonstrated that telecommunications services for correctional institutions are a highly specialized and unique market that necessitates special regulatory treatment.⁸ For instance, Gateway explained that BPP would destroy the economic basis for the provision of sophisticated correctional institution CPE, that long-distance carriers lack the ability or incentive to serve the security, fraud and budgetary needs of America's prisons and jails, and that, quite unlike the OSP market, there is no appreciable industry-wide rate problem in the inmate services market.⁹ By radically changing the economic structure of the inmate services market, BPP would harm the interests not only of correctional institutions and taxpayers, but also inmates themselves, who would be threatened with sharp curtailment of their telephone privileges, rehabilitative programs and other benefits.¹⁰

The overwhelming majority of parties commenting on the issue of inmate services joined Gateway in opposing the extension of BPP to correctional institutions. In addition to numerous comments from state, county and local prisons, jails and correctional associations,¹¹ the major national correctional institution systems and associations fully supported an exemption for inmate services. The Federal Bureau of Prisons, for

⁸ "Over the past decade, entrepreneurial firms like Gateway have developed important equipment and service innovations to meet the unique requirements of correctional institutions for security, fraud control and budgetary management, needs that remain largely unserved by the major long-distance and operator services providers ('OSPs'). As a result, the specialized prison communications environment simply does not present any of the problems supporting application of BPP to the public payphone and operator services markets generally." Gateway Comments at 4.

⁹ Gateway Comments at 9-16.

¹⁰ *Id.* at 13-15 & n.27.

¹¹ Eighteen county sheriffs and 10 state correctional departments opposed application of BPP, as did 11 individual correctional facilities and four state correctional associations. Every corrections official and department commenting opposed billed party preference.

instance, a division of the U.S. Department of Justice, "strenuously object[s]" to BPP because it would "substantially reduce the control correctional professionals have over their telephone systems" and "hinder and possibly eliminate many of the fraud protection and security techniques currently being used at most federal facilities."¹² Similarly, the American Jail Association ("AJA"), representing sheriffs, jail administrators and corrections officers at more than 3,200 jails nationwide, emphasized that BPP is "a direct assault" on the twin pillars of correctional facility communications—routing inmate traffic to a single carrier and "installing technically advanced inmate calling systems"—because "[o]ur jails cannot afford to provide inmate telephone equipment that has the necessary controls without the assistance of inmate phone service providers."¹³

There was also uniform opposition from other inmate services providers,¹⁴ the APCC's Inmate Calling Services Providers Task Force ("APCC/ICSPTF"), and nearly all of the Regional Bell Companies.¹⁵ Significantly, Ameritech and Bell Atlantic both reversed their previous positions—specifically relied on in the Further Notice (see FNPRM ¶ 46 nn. 72-73)—and reported that there have been no technical advances at the network level that solve the problems of security and fraud facing correctional institutions. Ameritech commented that an exemption from BPP is justified "due to increased fraud risks" that "are not reflected in the BPP service design."¹⁶ As Bell Atlantic emphasized, in this light "it would be foolish to extend billed party preference to inmate services."¹⁷ NYNEX and Pacific Bell were essentially unopposed to special treatment of

¹² Federal Bureau of Prisons Comments at 1, 2.

¹³ Letter from Stephen J. Ingley, AJA, to Hon. Reed H. Hundt, July 26, 1994 ("AJA Comments"), at 2, 4. According to AJA, "BPP would eliminate the financial base for specialized inmate calling systems and jeopardize the very existence of inmate phones." *Id.* at 3.

¹⁴ *E.g.*, VAC Comments at 4-8; LocTel Comments at 2-5; Tele-Matic Comments at 1-3; Opus Correctional Comments at 3-10; Intellipay Systems Comments at 5-6; CompTel Comments at 31-32.

¹⁵ BellSouth did not comment specifically on inmate services, but was opposed to billed party preference generally. US West did not file opening comments in this docket. Thus, the only RBOC that fully supported application of BPP to inmate services was Southwestern Bell, as discussed below.

¹⁶ Ameritech Comments at 11, 13.

¹⁷ Bell Atlantic Comments at 17.

inmate communications.¹⁸ Regulators as well, such as NARUC and the Pennsylvania PUC, generally called for the FCC to recognize the unique needs and circumstances of correctional institutions, and not to mandate BPP until carefully examining ways to maintain special treatment for the inmate services market.¹⁹

In contrast, the few carriers supporting application of BPP to inmate services offered neither policy nor empirical bases for such a change, resting instead on rhetorical flourish. Southwestern Bell suggests only that "BPP must be ubiquitous" and asserts that correctional institution fraud and security interests are "a red herring," without ever addressing the technical issues on which the FNPRM sought comment.²⁰ AT&T similarly argues only that recipients of inmate calls "should not be deprived" of their choice of carrier,²¹ also without discussing technical issues and without recognizing that the FCC's current rules affirmatively permit correctional institutions to presubscribe all inmate traffic to a carrier selected by the institution, not the inmate or the called/billed party. See Gateway Comments at 8, 10.²² A useful contrast is Sprint, which forthrightly did not oppose a BPP exemption for inmate services—assuming such an exception

¹⁸ NYNEX is "not opposed" to a BPP exemption for inmate services. NYNEX Comments at 16. Pacific Bell emphasized that application of BPP in the correctional environment would be appropriate only if the Commission develops "special provisions" such as requiring call control systems at correctional facilities and protecting the important "revenue stream" generated by today's inmate services market. Pacific Bell Comments at 3.

¹⁹ NARUC Comments at 4; Pennsylvania Public Utility Commission Reply Comments, at 14-16 (filed Aug. 30, 1994).

²⁰ Southwestern Bell Comments at 14-15.

²¹ AT&T Comments at 27. GTE likewise relied on carrier choice to argue that BPP should apply to inmate services, but actually opposed development of the tariffed anti-fraud LIDB protections discussed in the FNPRM, asserting that this would "result in significant software development and installation costs for LEC end offices." GTE Comments at 13.

²² MCI, another leading advocate of BPP in the correctional institution environment, curiously did not even comment on the issues, including the FNPRM's technical proposals based on its own ex parte presentations. FNPRM ¶ 45 & nn. 70-71 ("MCI disputes that fraud control would be inefficient in a BPP environment"). It should not escape the Commission's notice that AT&T and MCI, both of whom have supported applying BPP generally as well as to prisons, have the highest market shares in operator services. By placing inmate services on a par with "0+" services provided to hotels, payphones and other aggregator locations, these carriers would extend their dominance of the OSP market to the correctional institution market, resulting in a major revenue windfall they have, to date, been unable to earn through competition for correctional institution presubscriptions.

would not “materially increase” BPP costs—because toll fraud “would undoubtedly be a problem under billed party preference.”²³

Stripped of the few, essentially superficial oppositions, therefore, virtually all of the carriers, correctional institutions and regulators commenting to date support exempting inmate services from billed party preference. Indeed, no party has seriously suggested that either of the Commission’s twin rationales for BPP—customer confusion associated with access code dialing, and unreasonably high OSP rates—have any real application to correctional institutions,²⁴ or even that the Commission enjoys the statutory power to direct prison and jails, which are not “aggregators” under TOCSIA, to implement BPP.²⁵

II. The Comments Completely Contradict the Further Notice’s Assumption that Network Technological Developments Can Satisfy the Fraud and Security Requirements of Correctional Institutions

None of the interexchange or local exchange carrier commenters demonstrated, let alone argued, that LIDB, “flex-ANI,” or any other network-based technology was adequate to meet the fraud and security requirements of American prisons and jails. Indeed, despite the Further Notice’s express invitation for comment on the “effectiveness and costs” of controlling fraud on inmate lines under a BPP scenario (FNPRM ¶ 51), not even MCI, a leading proponent of BPP for correctional facilities, presented the Commission with evidence corroborating that network fraud and call controls are an effective replacement for the CPE-based protections currently dominating the correctional institution market. In this regard, CURE’s optimistic prediction that flex-ANI would provide “global call control protection” for correctional facilities²⁶ was unsupported by any carrier comments. CURE also failed to address the limited avail-

²³ Sprint Comments at 41. Sprint cautioned that “control of fraud under BPP would require LECs to provide information to OSPs that is not always provided today.” *Id.*

²⁴ Gateway Comments at 9-12.

²⁵ *Id.* at ii, 21, 21 n.43.

²⁶ CURE Comments at 7 n.11.

ability of these ANI class-of-service features from rural central offices and smaller independent LECs, as well as the need for ubiquitous availability, discussed in Gateway's opening comments. See Gateway Comments at 17.²⁷

The record before the Commission, in short, completely contradicts the FNPRM's apparent assumption that network fraud controls can be developed that would serve as adequate, cost-efficient alternatives to the sophisticated CPE-based systems currently utilized by Gateway and other inmate services providers. For example, with a detailed review of LIDB's capabilities, Ameritech reported that LIDB arguments "miss the mark" because "the features necessary to control inmate calls" are "not part of BPP" and "cannot be easily implemented on the public switched network."²⁸ Indeed, Ameritech confirms that, as Gateway suggested, under BPP a call placed from a prison or jail "could easily be processed as a calling card call" by most if not all IXC's, exposing carriers to vastly more potential fraud than the current CPE-based system.²⁹

The other commenters discussing technical issues were in accord. Bell Atlantic stated flatly that "[t]here are no technical advances that solve the problem that occurs when inmates have access to multiple networks and operators, and, contrary to the Commission's apparent belief, billed party preference does not increase in any way the exchange carrier's ability to prevent fraud."³⁰ Extending BPP to correctional institutions "would only make an already bad situation worse."³¹ Consolidated Communications, an independent LEC and OSP, noted that there are numerous fraud prevention activi-

²⁷ Ubiquity would be required not just in the availability of a consistent flex-ANI uniquely identifying prison lines from all LECs, but also in the uniform development, by all OSPs, of calling system modifications blocking all but collect calls on receipt of such signaling information. Gateway Comments at 17. No commenter supporting application of BPP to correctional institutions attempted to quantify the financial costs of these technical changes. In today's environment, such technical changes would be completely unnecessary, because OSPs can choose whether or not to serve correctional institutions.

²⁸ Ameritech Comments at 12-13. Moreover, Ameritech confirmed that calls originating from prisons do not carry a unique originating line screening code, but rather a "generic alternate-billing-only" code that is associated with numerous applications other than inmate telephones. Id. at 12.

²⁹ Compare Ameritech Comments at 12 with Gateway Comments at 18 n.35 and 21 n.41.

³⁰ Bell Atlantic Comments at 17 (emphasis supplied).

³¹ Id. at 18.

ties that only "a single telecommunications provider at an inmate site can institute."³² And Sprint, as noted previously, agreed that toll fraud would simply not be remedied by BPP.

Added to the total absence of support for the FNPRM's technical fraud-control assumptions, the record is also devoid of any indication of how, under a BPP scheme, correctional institutions would obtain the sophisticated CPE necessary to maintain fraud and security protections. CURE incorrectly insists that CPE call controls will not be affected by BPP, never confronting the fundamental fact that in today's correctional institution market, most CPE is installed free of charge by inmate services providers.³³ No party has suggested any way in which this expensive and admittedly key equipment would be financed in a BPP environment. To the contrary, although Gateway showed that the costs of CPE alone for correctional institutions could be \$317 million or more, Pacific Bell proposes that BPP be conditioned on having call control CPE "required and implemented at all inmate locations" prior to implementation.³⁴ Requiring the technology is no answer, however, since the real issue is the inability of federal, state and local correction systems, in a difficult budgetary period, to pay for the necessary call processing CPE. While the present market provides a simple, cost-effective solution to that problem, under BPP no carrier would have the incentive to provide specialized correctional institution CPE, since they would be deprived of the supporting revenue stream from long-distance traffic.³⁵

By the same token, the suggestion by some parties that inmate services should be included in BPP merely so the costs of billed party preference are spread across a larger base of users misconceives the nature of the cost/benefit analysis before this Commis-

³² Consolidated Communications Comments at 7.

³³ CURE Comments at 5-6.

³⁴ Pacific Bell Comments at 3.

³⁵ Gateway Comments at 13-15; Bell Atlantic Comments at 18 n.36; AJA Comments at 3-4; FBP Comments at 2-3.

sion.³⁶ Correctional institutions, while accounting for a significant proportion of collect calls, are a relatively insubstantial proportion of overall "0+" traffic (calling cards, operator-assisted calls, etc.); their inclusion or exclusion in BPP will thus have little practical effect on the per-call cost of the system.³⁷ Moreover, whatever minimal effect correctional institutions might have on the huge overall costs of billed party preference, that marginal impact is clearly eclipsed by the substantial, and otherwise unnecessary, costs a BPP scheme would impose on correctional facilities for call processing CPE. Without an independent policy and empirical basis for applying BPP to inmate services—completely lacking on this record—the issue of cost compels an exemption for correctional institutions.

III. There is No Record or Empirical Support for the Rate-Related Concerns Voiced By CURE and Other Advocates of Extending BPP to Inmate Services

The most vocal supporters of a billed party preference rule for correctional institution inmate services are two advocacy organizations—CURE and the Public Utility Law Project of New York ("PULP/NY")—both of which argue that BPP is needed to protect carrier choice and redress excessive rates. Neither of these interest groups, however, challenges the basic limitation of inmate calls to a "0+" collect basis—an industry practice supported by every commenting LEC, IXC, PUC and correctional institution in recognition of the unique and substantial fraud concerns faced in the prison environment. Furthermore, neither group offers any explanation for how application of BPP to correctional facilities could be harmonized with the Commission's 1991 decision to exempt inmate services from aggregator access code unblocking requirements because correctional institutions present "an exceptional set of circumstances that warrants their exclusion from regulation."³⁸

³⁶ E.g., NYNEX Comments at 16; Southwestern Bell Comments at 14.

³⁷ And as AT&T notes, collect calls "are declining as a proportion of dial '0' traffic and . . . the potential benefits of BPP are diminishing accordingly." AT&T Comments at 27 n.45.

³⁸ Policies and Rules Concerning Operator Service Providers, Report and Order, 6 FCC Rcd. 2744, 2752 (1991). Indeed, CURE continues to refer to the carriers providing inmate services incorrectly as
(Footnote continued on next page)

More importantly, neither CURE nor PULP/NY offers any empirical or general market data demonstrating a significant rate problem in the correctional institution services market. CURE's allegation of "the excessive rates that accompany inmate collect calls" is completely unfounded; unsubstantiated references to unreasonable rates and anecdotal (frequently incomprehensible) letters from inmate families offering vague rate concerns are entirely inadequate for Commission rulemaking action. Indeed, despite the specific showing, by Gateway and others, that charges for inmate collect services are, for the most part, virtually indistinguishable from major OSP collect rates, CURE nonetheless baldly contends—with no substantiation—that inmate families "for years have been victimized by predatory and oppressive charges."³⁹ Nothing could be further from the truth. Certainly the Commission has nothing for inmate services approaching the tremendous (and continuing) volume of rate-related complaints filed by consumers against OSPs serving payphones, hotels and other aggregator locations. See Gateway Comments at 10 & n.12.

Having chosen not to file a single Communications Act complaint with the Commission involving inmate services, it is simply not credible for these inmate advocacy groups to maintain, without supplying proof, that there is a severe problem of rate gouging in the correctional institution market. The few carriers taking a similar position fare no better, parroting CURE's bald allegations that commissions "encourage higher charges to be paid by relatives and friends of the calling inmates," but offering no supporting evidence.⁴⁰ If there indeed are inmate services firms whose rates are excessive, then as a first step selective enforcement of Section 202 of the Communications Act under the Commission's complaint process is called for. The Commission acted in precisely this fashion in 1991-92, when it substantially reduced OSP rates by charging a se-

"OSPs," when the Commission's 1991 decision clearly held that the carriers are not OSPs and that correctional institutions are not aggregators. See Gateway Comments at 8 n.8, 21 & n.43.

³⁹ CURE Comments at 3.

⁴⁰ Southwestern Bell Comments at 15; see Sprint Comments at 40.

ries of carriers with "show cause" orders under TOCSIA, requiring them to justify or lower rates that exceeded a reasonable benchmark.⁴¹ The suggestion by CURE and its inmate advocacy allies that the Commission lacks resources to enforce reasonable inmate service rates is thus belied by its failure to utilize any of the available enforcement mechanisms before predicting their failure.

In short, to the extent the interest group advocates contend that the inmate services market must be subject to BPP in order to protect against unreasonable rates, the facts are that rate levels for inmate services are fully competitive with the average major OSP collect rates used as a benchmark in the FNPRM.⁴² Indeed, while Gateway and its competitors have generally maintained rate levels, AT&T has steadily increased its rates for collect services, most recently by significantly raising usage charges on July 29⁴³ and on September 2 proposing a 43% increase in the service charge applicable to prison collect calls, from \$2.10 to \$3.00.⁴⁴ Unlike the payphone market, and apparently unlike the dominant OSP's pricing patterns, there is no widespread problem of rate increases or rate abuses in the inmate services market generally.⁴⁵ The general use of rate regulation

⁴¹ See, e.g., In re Advanced Technology Cellular Telecommunications, CC Docket No. 91-324, Order (Dec. 23, 1991); In re Com Systems, Inc., CC Docket No. 91-329, Order (Dec. 23, 1991); In re Conquest Telecommunications, Inc., CC Docket No. 91-327, Order (Dec. 23, 1991); In re South Texas Phone, Inc., CC Docket No. 91-335, Order (Dec. 23, 1991); In re TelTrust, Inc., CC Docket No. 91-333, Order (Dec. 23, 1991); In re U.S. Fiberline Communications, CC Docket No. 91-334, Order (Dec. 23, 1991); In re U.S. Long Distance, Inc., CC Docket No. 91-335, Order (Dec. 23, 1991); In re Peoples Telephone Co., CC Docket No. 91-331, Order (Jan. 30, 1992).

⁴² PULP/NY's comparison of inmate collect rates to DDD rates, PULP/NY Comments at 7 (47% higher than "the direct dial weekday rate"), is incorrect and terribly misleading, because inmate services, unlike DDD services, cannot be billed to the originating line, requiring special operator or automated handling.

⁴³ Gateway Comments at 11 & n.16 (AT&T increases rates 20% higher than 1991 levels).

⁴⁴ AT&T Tariff F.C.C. No. 1, Transmittal No. 7458 (filed Sept. 2, 1994, effective Oct. 17, 1994). AT&T has also initiated a significant increase in usage charges for operator station and operator dialed calls billed to calling cards. AT&T Tariff F.C.C. No. 1, Transmittal No. 7422 (filed Aug. 26, 1994, effective Sept. 9, 1994).

⁴⁵ CURE also makes repeated reference, again without offering substantiation, to "service quality" problems facing inmates. The fact is, however, that the only specific service "problem" they cite—limitation of inmate calls to 15 minutes (CURE Comments at 12 n.21)—is one of the important benefits offered to correctional institutions by inmate CPE providers, since this feature ensures equitable access of all inmates to telephones without requiring active supervision by corrections officers. See Gateway Comments at 6, Atch. A. at 4; AJA Comments at 3.

terms in correctional institution contracts, in any event, provides considerable protection against unreasonable inmate service rates.⁴⁶

IV. The Social Welfare and Tax Policy Arguments Offered by the Inmate Advocacy Groups are Meritless, Shortsighted and Possibly Unconstitutional

The advocacy interest groups raise a variety of broad social policy arguments against exempting inmate services from BPP, including the "financial burden" of telephone charges on inmate families and the important rehabilitative effect of inmate/family telephone communication. To the extent these issues are relevant to the matter before the Commission, their common error is that the current inmate services market is already working efficiently in ways that help, rather than harm, the interests of both inmates and correctional institutions.

The communications and financial requirements of inmate families are an insufficient basis to override the needs, and reasonable administration decisions, of federal, state and local correctional systems.⁴⁷ Like the courts, the FCC should defer to the choices made by prison and jail administrators; telephone communication for inmates is a privilege, not a right, and is subject to any reasonable limitation necessary for prison and jail security. As APCC/ICSPTF points out, the Commission "would necessarily be regulating prison administration and interfering with the decisions that prison officials make" by imposing BPP on correctional institutions.⁴⁸ The Commission should not attempt to usurp the traditional administrative powers of correctional officials.

At the federal level, the Federal Bureau of Prisons' opposition to BPP presents the Commission with precisely the policy reasons why such deference makes good sense. Not only does FBP concur that billed party preference would eliminate necessary secu-

⁴⁶ Gateway Comments at 10-11 & n.13.

⁴⁷ PULP/NY's emotional argument that inmate families are often low-income or economically disadvantaged (PULP/NY Comments at 5-6) is immaterial, as it would logically also suggest that the Commission require inmate services to be provided free or below-cost, certainly not an appropriate outcome of this proceeding.

⁴⁸ APCC/ICSPTF Comments at 5; see Gateway Comments at 21-22 & n.44.

rity, fraud and revenue benefits for local, state and federal corrections systems, but it has promulgated extensive regulations memorializing, as a matter of federal policy, penal institution practices entirely inconsistent with BPP.⁴⁹ Among other things, the amended regulations provide for the installation of a direct dialed telephone system, under which inmates will be responsible for payment of charges.

FBP concludes that the telephone systems available under the amended regulations will provide "an important contribution to the goals of responsible correctional management" in a number of ways. 59 Fed. Reg. at 15812. First, the use of a single direct dialed provider without operator intervention will make it easier to prevent criminal activity originated through prison telephones. Second, the regulations will enhance prison security by providing an economic imperative to limit the duration of calls as well as the technical ability for the administration to remotely shut off service to an inmate or telephone station, thereby also causing a savings in manpower costs. Most significantly, by making inmates pay for calls, the regulations will teach inmates responsibility and management of resources and create positive incentives to obtain higher skilled and higher-paying work assignments. *Id.* at 15812-14.

FBP has concluded that implementation of this new system is vital to its statutory mission to provide for the "discipline, treatment, care, rehabilitation and reformation" of inmates confined in federal prisons. *Id.* at 15814, citing 15 U.S.C. §§ 4001-02; 28 CFR § 0.96(p). The extension of BPP to federal correctional institutions—which would give the inmate the right to choose the carrier for his/her calls—would effectively prevent FBP from implementing the policies embodied in its amended regulations. FBP Comments at 2. In short, FBP has decided for the federal government that telecommunications can best be used for inmate rehabilitation and security only in a manner inconsistent with BPP. The FCC should not substitute its own judgment on

⁴⁹ Telephone Regulations and Inmate Financial Responsibility, 59 Fed. Reg. 15812 (April 4, 1994).

matters of correctional policy over the strong objection of responsible correctional officials.

Moreover, there is simply no question that the current inmate services industry, which developed to meet a need not addressed by either the LECs or the major OSPs, is actually functioning far better than any alternative system, including BPP. The problem in this market prior to the entry of Gateway and similar entrepreneurial firms was that correctional facilities—particularly smaller county and local jails—were simply unable to obtain payphone equipment and adequate service from the major carriers.⁵⁰ The result was few phones, poor service, and the lack of adequate communications for inmates. AJA comments that:

not more than a decade ago, specialized inmate calling systems were generally not available to our nation's jails. Indeed, a good number of jails were in rural areas where small independent local telephone companies refused to provide inmate phone service.

AJA Comments at 3.⁵¹ Two specific examples, both from counties in Arkansas, are reflected in ex parte letters from the responsible sheriffs attached as Exhibit A to these reply comments. For instance, in Prairie County, Arkansas, the local exchange company provided only one payphone for a 20-prisoner jail, but "removed this phone, claiming it was not profitable," forcing the jail to allow inmates to use its "two emergency lines" for routine phone calls.⁵²

BPP, in contrast, would have an even more pronounced negative effect on prisons and inmates. First, without financial incentives to provide sophisticated CPE, carriers like Gateway would withdraw from the market or stop installing free CPE, requiring massive tax expenditures for call processing equipment or, more likely, the re-imposition of drastic limitations on inmate calling privileges. Second, the fractionalizing of correctional institution traffic among many carriers would deprive prisons and jails of

⁵⁰ Gateway Comments at 5-6.

⁵¹ Accord APCC/ICSPTF Comments at 17-18.

⁵² Letter from Dale Madden to Secretary, FCC, dated Sept. 13, 1994, at 1 (Exhibit A hereto).

the responsive, customized service only available from a carrier contractually obligated to meet the institution's security and fraud control needs. As AJA eloquently commented, BPP threatens the very basis upon which correctional facilities can "provide frequent and unsupervised inmate calling opportunities;" by eliminating the "revenue stream supporting inmate phone service providers," AJA "predict[s] that there will be few, if any, phones available for exclusive use by inmates."⁵³

The interest group advocates are also incorrect in challenging the payment of commissions to correctional institutions; these revenue-generating activities are a positive development, not a market failure necessitating FCC supervision. As Gateway explained, the FNPRM's assumption that payphone commission competition has harmed end users by increasing service rates is clearly not applicable to the correctional institution market, where commissions have not only not resulted in any widespread rate excesses, but where these payments have been applied—in lieu of general tax expenditures—to fund facilities and services for the inmates themselves.⁵⁴ To the same effect, FBP, among others, commented that "the limited amount of commissions generated by [inmate] collect calls is returned to a general prisoner trust fund which in turn uses the money for inmate recreation projects."⁵⁵

Nor are the interest groups at all correct in suggesting that commissions are somehow invalid because the revenue burden of inmate welfare programs should be

⁵³ AJA Comments at 3, 4.

⁵⁴ Gateway Comments at 15-16. If commissions are the "bogeyman" driving the Commission's BPP policy for payphones, that simply isn't true for inmate services. To the contrary, for roughly the same collect rates charged by the major (not so-called "third-tier") OSPs, firms such as Gateway not only provide long-distance service, but also supply free CPE, along with software and related management services, and make commission payments to correctional customers, indicating the relative efficiency of the inmate services marketplace. And if it is doubtful whether BPP would eliminate commissions and reduce rates in the OSP market—where such customer acquisition costs would likely be transferred by carriers to their advertising/marketing budgets—that is at least equally true of the inmate services market, since rates and practices under a BPP scheme for correctional institutions would mirror the broader market for collect calling. (If AT&T's rate practices are an indicator, moreover, even the mere prospect of applying BPP to correctional facilities has lead to significant rate increases by the dominant OSP.)

⁵⁵ FBP Comments at 2.

"the responsibility of the community at large." CURE Comments at 10. This is nothing more than an argument that the Commission should impose BPP in order to shift onto taxpayers the responsibility of recovering the costs associated with inmate communication fraud and security controls. The reality is that Commission imposition of BPP would shift the burden of paying the costs associated with inmate communications from the cost causers (the inmates and the parties they call) to the general body of taxpayers or ratepayers. Indeed, PULP/NY admits that its goal is to use BPP as a mechanism to mandate that prison costs be "funded from general tax revenues."⁵⁶ The Commission, however, has always followed the principle of recovering communications costs from the users causing them. Furthermore, in balancing the interests of taxpayers and inmate families, the Commission must plainly give priority to taxpayers, particularly where the potential revenue impact (\$317 million in the first year) is so substantial. Indeed, the advocates' suggestion that the Commission use BPP to transfer inmate communications costs to the general body of taxpayers contradicts the political reality of strained correctional system budgets and the constitutional constraints on federal government power to direct state tax expenditures.⁵⁷

CURE's argument that BPP would not affect the economic structure of the inmate services market because substantial commission revenues would still be payable on intraLATA and intrastate traffic is absurd.⁵⁸ This position is so flatly inconsistent with CURE's insistence that inmate families merit choice of carrier that it cannot be entertained seriously; why should BPP be retained at one jurisdictional level merely in order to generate funds allowing its removal for interstate calls? Indeed, CURE's only response to the economic reality that BPP would destroy carrier incentives to provide necessary inmate CPE is its observation that intrastate commissions would still be suffi-

⁵⁶ PULP/NY Comments at i, 13.

⁵⁷ Gateway Comments at 14 & n. 25.

⁵⁸ CURE Comments at 4, 6-7

cient to support the marketplace. CURE Comments at 7. CURE provides absolutely no record support for its presumption that traffic from state and county correctional institutions is predominantly local and intraLATA, which in any event is not an accurate generalization.⁵⁹

V. There is No Legal or Technical Basis to Preempt State Regulation by Applying BPP to Intrastate and IntraLATA Traffic

The reason to maintain the existing inmate services market structure for intrastate communications is different, and arises from the established constitutional limitations on the Commission's powers to preempt state regulation. The Commission's statutory jurisdiction over communications services is limited to interstate calls. Intervention into purely intrastate communications services has been strictly limited by the courts and FCC decisions to several narrowly defined circumstances, discussed below, which clearly do not exist here.

The record in this proceeding simply does not support preemption of intrastate operator or inmate services. Indeed, the Commission posed the issue merely in a footnote and provided neither a legal basis nor a policy justification for preemption.⁶⁰ The comments advocating ubiquitous deployment of BPP similarly fail to address either of these matters. AT&T, for example, never mentions "preemption," instead merely urging in a single paragraph that BPP should include intraLATA calls to avoid claimed, but undefined, "confusion." AT&T Comments at 25.

It is apparent that the Commission lacks the legal authority to apply BPP to intrastate and intraLATA traffic. The courts have recognized essentially three circumstances in which preemption of state regulation is permissible: (i) the conduct is ex-

⁵⁹ Gateway is unaware of any industry data regarding the proportion of intrastate and interstate traffic from different types of correctional institutions, but notes that municipal jail facilities in larger metropolitan areas (Los Angeles, New York, Washington, etc.) are frequently far larger, with a more diverse inmate population, than state and federal prisons, suggesting that long-distance call volume is related more to the size of a correctional facility than its mere status in the federal/state system.

⁶⁰ FNPRM ¶ 48, n.74 ("We do not now address whether we could or should require BPP for intraLATA calling").

pressly preempted by the Communications Act or other statute; (ii) a conflict exists between state and federal regulation which makes the existence of both regulatory schemes impracticable; or (iii) a compelling federal policy would be thwarted absent a uniform nationwide regulatory scheme. None of these circumstances exists here.

First, as the Commission is well aware, state regulation of intrastate and intraLATA communications from correctional institutions is not expressly preempted by the Communications Act or other statute. To the contrary, state agencies in general—and state correctional agencies in particular—have been regulating these communications services—just as they have regulated other forms of purely intrastate service—for many years.

Second, there is no basis in the record to conclude that the existence of inconsistent state and federal regulatory schemes, as applied to correctional institutions, would be impracticable. In analyzing this issue, the courts have held that preemption is justified only where implicated state regulation(s) “stand as an obstacle to the accomplishment and execution of the full objectives of Congress.” Louisiana Public Service Commission v. FCC, 476 U.S. 355, 369 (1986). Thus, for example, the Commission preempted state entry regulation of nationwide paging services where the existence of such regulations threatened to delay deployment of these service, in conflict with the clear intent of Congress. Paging Preemption Order, 93 F.C.C.2d 908, 921 ¶ 33 (1988). Similar circumstances do not exist here. The Commission could (although it should not) apply BPP to interstate calls from correctional institutions without also extending its reach to intrastate calls; as a technical matter, a federal BPP requirement could easily co-exist alongside a system of state regulation permitting presubscription of payphone and other aggregator equipment. Thus, there is no conflict between state and federal regulation making the existence of different schemes impracticable.

Finally, there is no compelling federal policy that must be preserved through preemption. The comments contain a wealth of evidence that the management and

control of correctional institutions is fundamentally a local issue that is, and should remain, within the exclusive jurisdiction of states and localities. Moreover, it is clear that communications services are an inherent part of the administration of each correctional institution and a reflection of the specific rehabilitation program deemed appropriate to that institution. In these circumstances, preemption would be a particularly pernicious intrusion by improperly entangling the Commission in local correctional issues in which it has no right to be involved and in which no compelling federal policy is implicated.

VI. An Inmate Services Rate Cap is Acceptable, If At All, Only as Part of a Package of Implementation Measures

There simply is no market-wide rate or communications policy issue that compels extension of billed party preference to inmate services. If the Commission nonetheless moves forward, there are several implementation mechanisms required in this unique market. Two of these—a phase-in requirement that honors existing long-term correctional institution contracts, and deferral of BPP for inmate services until all necessary technical network modifications (LIDB, ANI signaling, etc.) are completed by all LECs—are addressed in Gateway’s opening comments.⁶¹

As to the issue of a rate “cap” or benchmark, Gateway continues to believe that this option, particularly in light of the Commission’s tenuous statutory and APA basis for prescribing by rulemaking a rate applicable to all inmate services providers,⁶² should be adopted only as a last resort, if carrier-specific rate enforcement proves ineffective. First, as VAC and others noted, a large proportion (85% or more) of current correctional institution RFPs and contracts already contain rate-related conditions.⁶³ Second, a rate cap could easily become a vehicle for tacit collusion in the marketplace, ac-

⁶¹ Gateway Comments at 25.

⁶² *Id.* at 24 & n.48.

⁶³ VAC Comments at 4 & Exh. 1; *see* Gateway Comments at 10-11 & n.13.

tually retarding price competition and stabilizing rates among inmate service providers instead of creating additional incentives for price reductions.

If a rate cap is to be fashioned, the Commission should craft a rule that exempts correctional institutions from the BPP requirement where they presubscribe their inmate-only telephones to a carrier whose rates are at or below the benchmark. Implementation should follow the model used in the Commission's cable system rate regulation scheme, whereby specific correctional facilities would "certify" their exemption from BPP under the rate cap provisions, certifications that would become effective automatically absent a timely showing to the Commission of invalidity.

Furthermore, in order to maintain carrier incentives for flexibility in mileage banding and time-of-day discounting, the Commission should fashion a quantitative rate benchmark using average daytime, operator-assisted collect rates, including service and surcharges, of several carriers, applying it with an 8 or 10-minute "sample" call. (Compare, for instance, the \$6.58 rate applied in the Commission's 1991-92 OSP rate enforcement proceedings.) By avoiding a rate cap tied to any one specific carrier's tariffs, the Commission would enhance administrative convenience in enforcement, while at the same time avoiding the inadvertent creation of a "price umbrella" in the inmate services market. In addition, a "safe harbor" of 10% deviation from the rate benchmark should be permitted, to ensure that small discrepancies in usage rates do not trigger violations.⁶⁴

Although CURE insists that rate abuses plague the inmate services market, it argues inconsistently that a rate cap is unjustified because such an approach would create a "regulatory morass" requiring a "steadfast and long-term" allocation of Commission

⁶⁴ Gateway Comments at 24. Several carriers, including AT&T, Ameritech and others, have suggested that the special requirements of inmate services may necessitate a price increment above typical operator-assisted daytime collect rates. Gateway, whose rates are among the lowest in the correctional institution inmate services market, does not believe such a difference is required, but has no objection if such a rate cap modification must be made in the interest of accommodating other providers.